## Foo Kok Hing & Anor v Lee Weng Lam

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO 1009 OF 1977
LC VOHRAH J
11 JUNE 1988

*Bankruptcy – Partnership property – Land registered in equal shares in name of first plaintiff and defendant – Withdrawal from partnership by defendant and his brother – Whether consideration paid – First plaintiff adjudicated bankrupt – Declaration whether he is entitled to whole of land in question – Surplus proceeds of sale to creditors be paid to Official Assignee*

This is an action for a declaration that the first plantiff was entitled to the whole of the land held under CT 6329 for lot no 27 in the town of Kajang together with the shophouse erected thereon known as no 65, Jalan Besar, Kajang ('the Kajang shophouse') and that the surplus of the proceeds of the sale of the Kajang shophouse amounting to $121,896.40 has vested in the second plaintiff for the benefit of the general body of creditors upon the bankruptcy of the first plaintiff.

The brief facts of the case are as follows. On 17 January 1968, the firm of Lian Woh Hardware and Company consisted of four partners, namely, the first plaintiff, his younger brother Foo Theng Fee, the defendant, and the defendant's brother Lee Weng Kam (DW 3). The firm originally carried on its trade as a dealer in hardware at a shophouse at no 3, Jalan Besar, Kajang and later at the Kajang shophouse which it purchased as partnership property on 14 January 1975 and which it had registered in the name of the first plaintiff and the defendant in equal shares. On 16 April 1977, the first plaintiff filed this suit to compel the defendant to transfer one-half undivided share of the Kajang shophouse to him. The first plaintiff was adjudicated a bankrupt on 2 June 1980 and on 13 September 1984 the second plaintiff, the Official Assignee, was ordered to be joined as co-plaintiff, by which time the Kajang shophouse had been foreclosed by the chargee, Malayan Banking Bhd. In ordering the judicial sale on 26 November 1980 of the Kajang shophouse, the court also ordered that the surplus of the proceeds of the auction sale be paid to the Official Assignee. The first plaintiff contended that when the defendant and his brother DW3 had decided to withdraw from the partnership together with the first plaintiff's brother, the defendant and DW3 were paid the agreed consideration of $140,000 for joint withdrawal.

The sole question for determination by the court is the amount that was agreed to be paid by the first plaintiff to the defendant and his brother DW3 for their joint withdrawal from the partnership.

**Held,** granting the declaration: (1) The amount to be paid to the defendant and DW3 for the joint withdrawal from the partnership is $140,000.

(2) The first plaintiff was entitled to the whole of the Kajang shophouse and that the surplus of the proceeds of its sale amounting to $121,986.40 has vested in the Official Assignee for the benefit of the general body of creditors upon the bankruptcy of the first plaintiff.

(3) The surplus sum together with all accrued interest now held in the fixed deposit account with Bank Rakyat be released to the second plaintiff.

*Puan Zaleha Yusof* (Senior Federal Counsel) for the plaintiffs.

*Dulip Singh* for the defendant.

*Cur Adv Vult*

**LC Vohrah J:** This is an action for a declaration that the first plaintiff was entitled to the whole of the land held under CT 6329 for lot no 27 in section 3 in the town of Kajang together with the shophouse erected thereon known as no 65, Jalan Besar, Kajang ('the Kajang shophouse') and that the surplus of the proceeds of the sale of the Kajang shophouse amounting to $121,896.40 has vested in the second plaintiff for the benefit of the general body of creditors upon the bankruptcy of the first plaintiff.

The brief facts of the case are as follows. On 17 January 1968, the firm of Lian Woh Hardware and Company consisted of four partners, namely, the first plaintiff, the defendant, the first plaintiff's younger brother Foo Theng Fee and the defendant's younger brother Lee Weng Kam (DW3). The firm originally carried on its trade as a dealer in hardware at a shophouse at no 3, Jalan Besar, Kajang and later at the Kajang shophouse which it purchased as partnership property on 14 January 1975 and which it had registered in the name of the first plaintiff and the defendant in equal shares. Earlier, on 18 May 1974, the firm had purchased a piece of land held under EMR 3397 for lot no 3726 in the mukim of Pilah in the district of Kuala Pilah ('the Kuala Pilah land') also as partnership property which it had similarly registered in the names of the first plaintiff and the defendant in equal shares. In October 1975, the four partners who had been good friends decided to dissolve the partnership and in consequence of that decision they caused an advertisement to appear on 15 November 1975 in the *Nanyang Siang Pau* announcing the withdrawal of three of the partners and the taking over of the partnership business wholly by the first plaintiff. Pursuant also to that decision, both the first plaintiff and the defendant, accompanied by one Wong Thiam Loy (DW1), presented themselves before solicitor Lai Wing Yong (PW3) of the firm of Shook Lin & Bok on 28 November 1975 in order to give instructions for the transfer of the defendant's share of the Kajang shophouse to the first plaintiff. No transfer, however, took place because the first plaintiff wanted the defendant to transfer the whole of his registered one-half undivided share in the Kajang shophouse whilst the defendant was willing to transfer only half of what was registered in his name. On 16 April 1977, the first plaintiff filed this suit which in its original form was an action for specific performance to compel the defendant to transfer his one-half undivided share of the Kajang shophouse to him but after the making of receiving and adjudicating orders against the first plaintiff on 2 June 1980 the second plaintiff was ordered on 13 September 1984 to be joined as co-plaintiff by which time the Kajang shophouse had been foreclosed at the instance of Malayan Banking Bhd to which it had been charged in 1974 by the partnership firm. In ordering the judicial sale on 26 November 1980 of the Kajang shophouse, the court also ordered that the surplus of the proceeds of the auction sale be paid to the Official Assignee.

It is the contention of the first plaintiff that when the defendant and his brother DW3 decided to withdraw from the partnership together with the first plaintiff's brother the consideration for the defendant's and DW3's joint withdrawal was $140,000 and that this amount has been fully paid up having been effected in the following manner:

(i) by the transfer of the first plaintiff's registered one-half undivided share in the Kuala Pilah land valued at $50,000 to the defendant;

(ii) by two cheque payments, one for $25,000 and the other for $10,000 to the defendant; and

(iii) by a cash payment of $55,000 to DW3.

The defendant, however, contends that the consideration for the joint withdrawal was $170,000 and that only a sum amounting to $85,000 has been paid to him and DW3 by the transfer of the Kuala Pilah land and by payment of the two cheques.

In the course of the trial, it has been conceded by counsel for the defendant that the Kajang shophouse was the property of the partnership. Accordingly, the only question for determination by the court is the amount that was agreed to be paid by the first plaintiff to the defendant and his brother DW3 for their withdrawal from the partnership. It is common ground that there is no question of law for determination and that the question turns solely on the credibility of the three partners who gave evidence. Their credibility has to be tested by considering their respective testimonies in the light of the disinterested evidence that has been furnished both by Ong Soon Kian (PW1), the firm's accountant and tax consultant who audited the partnership's accounts, and by PW3, the solicitor who had received at his office the instructions relating to the transfer of the Kajang shophouse from both the first plaintiff and the defendant which he found impossible to implement. Counsel for the defendant has conceded that the evidence of DW1 is not of much value to either side and I agree and would in fact go so far as to say that DW1 was not a credible witness for the reasons I shall explain later.

It is not in dispute that when the partnership was established, the first plaintiff's share of the capital was $14,822.22, the defendant's $5,014.82, DW3's $4,700 and Foo Theng Fee's $2,006 and that their profits from the business were to have been proportional to their respective shares. It is common ground that it was part of the oral arrangement for the defendant's and DW3's joint withdrawal from the partnership that of the two landed properties belonging to the partnership at the time of the dissolution, namely, the Kuala Pilah land and the Kajang shophouse, the former was to be transferred wholly to the defendant and the latter wholly to the first plaintiff in consideration of the sums that were agreed to by the partners for the taking over of the business solely by the first plaintiff.

The first plaintiff testified that as the Kajang shophouse was charged to Malayan Banking Bhd as security for the partnership's overdraft account, he and the defendant had to consult the bank's manager regarding the disposition of the Kajang shophouse. At the meeting with the manager, the defendant informed the manager that the defendant was withdrawing from the partnership and would transfer the defendant's entire one-half undivided share to the first plaintiff. As advised by the manager, the defendant wrote a letter dated 13 October 1975 (as evidenced by P11B) addressed to the manager stating that the defendant wished to transfer the defendant's share of the Kajang shophouse to the first plaintiff and requesting that the manager forward the land title to the bank's solicitors for necessary action. It was the manager who instructed them to go to Messrs Shook Lin & Bok to effect the transfer. They then met PW3 and explained that the defendant was to transfer the defendant's entire share in the Kajang shophouse to him because of 'withdrawal from the partnership' and informed PW3 that all moneys relating to the withdrawal had been paid. Apart from effecting transfer of his whole share in the Kuala Pilah land (valued at $50,000) to the defendant and making the two payments by cheque amounting to $35,000 to the defendant, he had also paid cash of $55,000 to DW3 as 'it was mutually agreed that the two brothers would get $140,000 for the withdrawal' and 'it was up to them to share the amount amongst themselves.' He did not obtain documentary acknowledgement from DW3 for the cash payment because they 'were good friends' and 'trusted each other' and also because DW3 had said that he would not be issuing any receipt in order 'to avoid problems' with the income tax authorities.

The defendant's version is that the first plaintiff was to pay him and DW3 $170,000 and not $140,000 for their withdrawal. So far, he had only received a sum amounting to $85,000 made up of the Kuala Pilah land valued at $50,000 and the two cheque payments. His obligation was only to transfer his one-quarter interest in the Kajang shophouse because when the partnership was established in 1967 it had been agreed at a meeting of all the four partners 'whatever assets were owned by the partnership business were to be divided into four shares, one quarter share for each of the partners.' The first plaintiff had promised to pay him $170,000 but due to the first plaintiff's financial difficulties, a discussion took place 'in a low tone' in the solicitor's office between the first plaintiff and himself during which the first plaintiff intimated that only $140,000 would be paid. He refused to accept this lower figure and indicated that he would then only agree to transfer his one-quarter interest in the Kajang shophouse.

In support of this defence, DW3 testified that the withdrawal amount due to himself and the defendant was $170,000 and that the first plaintiff did not pay him the sum of $55,000 or for that matter any sum at all. He denied in cross-examination that it had been a term of the dissolution arrangement that the defendant was to transfer the defendant's registered one-half interest in the Kajang shophouse but in re-examination he explained that originally there was such an agreement and it was only when the first plaintiff had failed to pay the full sum that the defendant refused to transfer the defendant's one-quarter interest.

PW1 in giving his testimony tendered the partnership's statement of account for the year ending 31 December 1975 (P3) which must have been prepared after that date and certainly some time after the dissolution of the partnership, and from it he derived the combined entitlement of the defendant and DW3 in respect of the share capital and profit as $140,000. He worked out the share capital and profit of each of the three withdrawing partners on the document P4 from figures provided by the partners and they disclosed a sum of $70,000 which was due to the defendant and a similar sum to DW3.

PW3's evidence was that when he interviewed the first plaintiff and the defendant at his office on 28 November 1978 regarding the transfer of the Kajang shophouse, he was told by the first plaintiff to transfer the defendant's undivided share in the Kajang shophouse to the first plaintiff and this instruction was confirmed by the defendant. These two partners informed him that the transfer was being made pursuant to the dissolution of a partnership but they did not disclose the terms of the withdrawal except the fact that the defendant had been paid his consideration for the withdrawal. Although the impression he got from them was that the defendant was transferring the whole of his share in the Kajang shophouse to the first plaintiff he was informed that the defendant was transferring his one-quarter share the value of which was $20,000 at that point of time. This piece of evidence cannot be an accurate recollection of the instructions he received from the first plaintiff and the defendant because of its patently contradictory nature and I can only conclude that PW3's recollection thereof has become confused by the passage of time.

DW1 was called to give evidence by the defence at the last moment. As alluded to earlier he struck me as quite an unreliable witness because he uttered a deliberate untruth when he said that PW3 had informed him that the sum which the first plaintiff was to pay the defendant and DW3 was $170,000, and I am satisfied from the evidence of PW3 that PW3 did not know the details of the dissolution arrangement and could not have known what the sum was. I accordingly consider DW1's evidence regarding this withdrawal sum unreliable and totally disregard it.

Of the three interested persons who gave evidence, I found the first plaintiff a very impressive witness. He struck me as being honest, sincere and gentlemanly and his answers were forthright and consistent throughout his examination on the stand. After listening to him and to the defendant and his brother DW3, I am more than satisfied that he was telling the truth and believe his evidence that the consideration for the withdrawal sum was $140,000 and that he had actually paid DW3 the sum of $55,000 without securing any documentary acknowledgement of that payment. As regards the defendant, I do not believe his evidence that the sum of $170,000 was reduced to $140,000 only at the solicitor's office when the plaintiff told him that he was in financial difficulties and could not meet the higher figure, particularly as PW3 testified that he was given to understand that all dues had been settled. I also find it hard to believe that such a conversation should have been conducted in a solicitor's office 'in a low tone' in the presence of PW3 and DW1 as there was no need for any secrecy for the conversation if it did take place. Nor did I find DW3 very reliable because he was adamant in cross-examination that it was not a term of the dissolution of the partnership that the defendant was to transfer his registered one-half undivided share in the Kajang shophouse. However, when he was re-examined on this point he tried rather lamely to explain that the defendant did originally agree to transfer the one-half undivided share registered in the defendant's name but that it was made up of his own one-quarter share and the defendant's other one-quarter share although he admitted that the Kajang shophouse was partnership property as such. Regardless of my impressions of these three witnesses on the stand, I have reviewed their evidence in the context of the totality of the evidence presented and I am satisfied on a balance of probabilities that the consideration for the withdrawal of the defendant and DW3 from the partnership was $140,000 and not $170,000. It is obvious from AB11, the certified English translation of the notice of withdrawal and takeover which appeared in the *Nanyang Siang Pau*, that the first plaintiff was going to take over the partnership business completely. This partnership business was carried on at the Kajang shophouse and it stands to reason that the business premises must have been intended to go with the goodwill of the business. The defendant has not disputed the fact that the intention of the parties was for the Kajang shophouse to be transferred wholly to the plaintiff. I do not accept the explanation by the defence that the partnership properties were to be divided into four parts, one part to each of the partners, especially having regard to the fact that they contributed different amounts to the share capital of the partnership. In my view, this explanation was an after-

thought to support PW3's questionable evidence that the defendant intended only to transfer his one-quarter interest in the partnership property in the form of the Kajang shophouse. I found that the defendant was quite inconsistent in his defence. In the original defence, he had averred that the first plaintiff agreed to pay the sum of $170,000 as the agreed purchase price for his share alone in the partnership and had categorically denied that this sum also included DW3's share. However at the end of the plaintiff's case he amended his defence to aver something totally opposite, ie that the sum was the consideration for both his share and DW3's share in the partnership business for the withdrawal and take-over exercise. In view of all the above reasons, I find as a fact that the amount agreed to be paid to the defendant (and DW3) for their joint withdrawal from the partnership business was $140,000.

I therefore declare that the first plaintiff was entitled to the whole of the Kajang shophouse and that the surplus of the proceeds of its sale amounting to $121,896.40 has vested in the Official Assignee for the benefit of the general body of creditors in the bankruptcy of the first plaintiff.

I also direct that the surplus sum together with all accrued interest now held in the fixed deposit account with Bank Rakyat be released to the second plaintiff.

*Order accordingly.*

Solicitors: *Dulip Singh & Co.*

Reported by *Wong Kim Fatt*

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## Polygram Records Sdn Bhd v Hillary Ang & Ors

HIGH COURT (KUALA LUMPUR) – CODE NO C2-22-52-88
SITI NORMA YAAKOB J
8 JUNE 1988

*Contract – Recording contract with exclusive performance clause – Interim injunction applied for to compel performance of negative agreement not to record with others – Whether damages a more appropriate remedy – Specific Relief Act 1950, s 55*

The plaintiffs, a music and sound recording company, applied for an interim injunction to restrain the first to fifth defendants from holding themselves out as being free to enter into any recording contract with any other recording company except the plaintiffs and to restrain the sixth defendant, a rival company, their servants and agents from entering into any distributorship agreement with the first to fifth defendants for the purpose of distributing their musical works recorded by the first to fifth defendants' own company or by any other company. The plaintiffs had entered into an agreement with the first to fifth defendants, whereby the latter undertook, for a period of two years, to perform musical works for the plaintiffs exclusively which the plaintiffs would distribute and sell. The plaintiffs alleged that the first to fifth defendants had breached their undertakings under the agreement by recording their musical works with other individuals, firms and companies, particularly the first to fifth defendants' company, and with the sixth defendant, thereby depriving the plaintiffs of the profits which they would otherwise have earned. The first to fifth defendants, whilst not disputing that they had breached their undertakings under the contract, contended at the hearing that (a) the contractual relationship between them and the plaintiffs no longer existed as there was no effective exercise by the plaintiffs of their option to renew the agreement after its expiry; (b) even if there was a contract, the court should be reluctant to grant an injunction as the contract was a contract of or for personal service; and (c) damages would be a more appropriate remedy.

**Held,** allowing the application: (1) Under the agreement, the plaintiffs were given an irrevocable option to renew the agreement for a further two years provided that the plaintiffs observed and performed all their obligations thereunder. There was nothing in the agreement to require the plaintiffs to communicate in writing to the first to fifth defendants their intention to renew the agreement. In the instant case, the plaintiffs had therefore properly and effectively exercised their option with the result that the agreement was still in existence and the first to fifth defendants were still bound by their undertakings not to perform for others except the plaintiffs.

(2) Although the contract was one for personal service, what the plaintiffs were trying to enforce was their right to have the undertakings given by the first to fifth defendants observed. Accordingly, under s 55 of the Specific Relief Act 1950, the court was not prevented from exercising its discretion to grant the interim injunction to compel the performance of a negative agreement asked for by the plaintiffs although the court could not compel specific performance of the affirmative agreement to perform.

(3) Bearing in mind the brand of music involved, the uncertainty of acceptance of their recordings and their selling power, the quantification of damages was not possible. Having regard to the peculiar facts of the instant case, an interim injunction was ordered to be issued with the usual undertaking as to damages by the plaintiffs in the event that the first to fifth defendants should succeed in having it set aside later. The interim injunction was to remain until further order.

**Legislation referred to**
Specific Relief Act 1950 s 55

*SF Wong* (*P Ramakrishnan* with him) for the plaintiffs.
*Muhammad Shafee Abdullah* (*Christina Kow (Miss)* with him) for the defendants.

*Cur Adv Vult*

**Siti Norma Yaakob J:** The first to fifth defendants in this suit are popular recording artistes belonging to a group called 'The Search'. On 12 June 1985, the second, third and fifth defendants, together with two others (who made up the original members of 'The Search'), entered into an agreement with the plaintiffs, a music and sound recording company, whereby for the next two years expiring on 11 June 1987, the group undertook to perform